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No. 91-1825

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

CARTERET SAVINGS BANK, FA,

Respondent,

vs.

LOUIS G. SHUSHAN; DONALD A. MEYER; RADER JACKSON; JACQUELINE McPHERSON; MITCHELL W. HERZOG; and SHUSHAN, MEYER, JACKSON, McPHERSON AND HERZOG,

Petitioners.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This is not, as petitioner contends, simply "a malpractice action." (*See* Petition at 4.) It is a suit by plaintiff/respondent Carteret Savings Bank, FA ("Carteret") against its attorney, who committed a fraud in New Jersey on Carteret, its client. Carteret submits that the Third Circuit properly held that there is no denial of due process by a long-arm rule which confers personal jurisdiction in New Jersey over Louisiana attorneys who, while in New Jersey, committed a fraud upon its client, a New Jersey financial institution, who had numerous communications directed to Carteret in New Jersey and whose wrong-doing had substantial adverse effects on Carteret and the public in New Jersey.

A. Facts

Defendants/petitioners Louis G. Shushan ("Shushan") and his law partners and firm (collectively the "Shushan Firm") represented Carteret, a New Jersey corporation whose principal office is in New Jersey, in connection with the preparation, negotiation and execution of various documents related to an $82 million loan to finance the construction of a multi-use project in Metairie, Louisiana (the "Project") by Three Lakeway Center Partnership ("Three Lakeway"). Shushan negotiated and prepared the Contractor's Consent Agreement that was executed by Carteret, Three Lakeway and Algernon Blair, Inc. ("Algernon Blair"), the general contractor on the Project. (*See* First Amended Complaint, hereinafter "Carteret's Complaint," Respondent Appendix at 14a-23a.) At no time during his representation of Carteret did Shushan disclose to Carteret (i) his long-standing and on-going legal representation of Algernon Blair, or (ii) that he could not negotiate the terms of the Contractor's Consent Agreement on Carteret's behalf due to his conflict of interest. (*See* Carteret's Complaint at ¶ 12, Respondent Appendix at 26a; Affidavit of Joseph Tockarshewsky, hereinafter "Tockarshewsky

Aff." at ¶¶ 7 and 9, Respondent Appendix at 28a; Affidavit of Steven A. Cole, hereinafter "Cole Aff." at ¶¶ 7 and 8, Respondent Appendix at 17a-18a.)

To the contrary, Shushan did not protect Carteret's interests, but instead, took action to benefit his client, Algernon Blair. (*See* Carteret's Complaint at ¶ 12, Respondent Appendix at 17a-18a.) In connection with the Contractor's Consent Agreement, Shushan intentionally (i) altered, without Carteret's authorization or knowledge, a critical provision which formed the basis for a judicial finding that Carteret was liable as a guarantor to Algernon Blair for $1.5 million (*see* Carteret's Complaint at ¶ 12, Respondent Appendix at 17a-18a; Tockarshewsky Aff. at ¶ 8, Respondent Appendix at 26a; Cole Aff. at ¶ 8, Respondent Appendix at 30a-31a), (ii) failed to inform Carteret that the terms of the Contractor's Consent Agreement were grossly unfavorable to Carteret (*see* Carteret's Complaint at ¶ 12, Respondent Appendix at 17a-18a; Tockarshewsky Aff. at ¶ 8, Respondent Appendix at 26a; Cole Aff. at ¶ 6, Respondent Appendix at 30a-31a), and (iii) misrepresented to Carteret the nature of his negotiations with Algernon Blair (*see* Carteret's Complaint at ¶ 12, Respondent Appendix at 17a-18a; Tockarshewsky Aff. at ¶ 8, Respondent Appendix at 26a; Cole Aff. at ¶ 11, Respondent Appendix at 31a-32a).

Carteret's Complaint set forth, in detail, Shushan's fraudulent conduct. It alleged, *inter alia*:

> 18. On May 29, 1985, Shushan met with Carteret and Carteret's counsel *in Roseland, New Jersey, at the offices of Carteret's New Jersey counsel*, for the purpose of rendering legal advice to Carteret and reviewing and finalizing all documents relating to the Three Lakeway Construction Loan, including, but not limited to, the Contractor's

Consent. Shushan knew at that and all other relevant times that Carteret was relying upon him and his Firm to represent Carteret's best interests, without any consideration to any competing or conflicting interests of any other person or entity involved in the Three Lakeway Project.

19. *At the said May 29, 1985 meeting with Carteret* and at all other times throughout his representation of Carteret in connection with the Three Lakeway Construction Loan, *Shushan intentionally failed to disclose to Carteret (a) the fact of and details relating to his professional relationship with and prior and/or current representation of Algernon Blair, as well as his personal relationship with its senior executives; (b) the unauthorized modification he had made to the Contractor's Consent, as aforesaid; and (c) the potential legal effect and consequences to Carteret of such unauthorized modifications.*

20. *Shushan and the Shushan Firm acted wrongfully at the May 29, 1985 New Jersey meeting* and at all other relevant times during the course of its representation of Carteret, in the following non-exclusive respects:

(a) by deliberately failing to disclose to Carteret and others present that they had amended the Contractor's Consent to the benefit of Algernon Blair and to the detriment of Carteret;

(b) by deliberately failing to secure Carteret's consent to the amendment;

> (c) by intentionally failing to inform and advise Carteret of the purpose and legal consequences of the unauthorized amendment to the Contractor's Consent;
>
> (d) by concealing from Carteret their prior communications with Algernon Blair concerning the Contractor's Consent;
>
> (e) by intentionally failing to disclose their long-standing professional and personal relationship with Algernon Blair; and
>
> (f) by taking deliberate actions to benefit their long-standing client, Algernon Blair, to the significant detriment of Carteret.

(*See* Carteret's Complaint, Respondent Appendix at 20a-21a (emphasis added).) The allegations were fully supported by affidavits of Carteret officers who attended the meeting in New Jersey. (*See* Respondent Appendix at 24a-32a.)

Further, the record established that there were numerous written communications from Shushan to Carteret in New Jersey. (*See* Cole Aff. at ¶ 9, Respondent Appendix at 31a.) Shushan carried out his fraudulent scheme through such correspondence. The record also established that Shushan telephoned Carteret in New Jersey on numerous occasions in order to discuss details of the loan, *including the Contractor's Consent Agreement*. (*See* Cole Aff. at ¶¶ 9-10, Respondent Appendix at 31a.) These communications by Shushan to Carteret in New Jersey — even without the New Jersey meeting where the fraud was consummated — warrant the exercise of jurisdiction in New Jersey over petitioners.

B. Procedural History

On December 5, 1988, after being found liable to Shushan's other client, Algernon Blair, pursuant to the Contractor's Consent Agreement, Carteret filed its initial Complaint in this action. (*See* Respondent Appendix at 1a-7a.) On January 24, 1989, defendants filed their Answer. (*See* Answer, Respondent Appendix at 8a-13a.) By notice dated March 12, 1989, defendants moved to dismiss the complaint for lack of personal jurisdiction. Carteret opposed the motion. On May 22, 1989, the U.S. District Court for the District of New Jersey ("District Court"), *sua sponte,* instructed defendants to file a motion to transfer the action to the Eastern District of Louisiana. By notice dated June 5, 1989, defendants filed a motion to transfer the suit under 28 U.S.C. § 1404(a). In opposition to defendants' § 1404(a) motion, Carteret filed affidavits of (i) Steven A. Cole, Carteret's loan officer on the Project, and (ii) ten non-party witnesses located in, among other places, Texas, Connecticut, Louisiana, Virginia and Washington, D.C., all of whom stated that they were willing to travel to New Jersey for deposition and trial or that New Jersey was a more convenient venue for them. Further, Carteret filed a certification that attached all of the documents in Shushan's files relating to the subject loan; these documents were produced in discovery and were already located in New Jersey.

On June 28, 1989, the District Court heard argument on the motions and ruled that it did not have personal jurisdiction over defendants. The District Court did not address the § 1404(a) motion. However, the District Court, again *sua sponte,* transferred the action to the Eastern District of Louisiana, pursuant to 28 U.S.C. § 1406(a). By notice dated July 10, 1989, Carteret moved for reargument or, alternatively, to vacate the transfer order. By Opinion and Order dated October 10, 1989 and as amended on October 12, 1989, the District Court denied Carteret's motion. *Carteret Sav. Bank v. Shushan,* 721 F. Supp. 705 (D.N.J. 1989).

Carteret filed an appeal and a petition for writ of mandamus to direct the District Court to vacate the transfer order. The U.S. Court of Appeals for the Third Circuit ("Third Circuit") ordered that the petition for mandamus be referred to a merits panel and consolidated with the appeal. By notice dated January 2, 1990, Shushan moved to dismiss the appeal for lack of jurisdiction, which Carteret opposed. The Third Circuit subsequently ruled as follows: (1) The Court did not have jurisdiction to decide the appeal of the personal jurisdiction ruling; and (2) a partial writ of mandamus would issue requiring the District Court to vacate the § 1406(a) transfer. *Carteret Sav. Bank, FA v. Shushan,* 919 F.2d 225 (3d Cir. 1990). Shushan sought rehearing or rehearing *in banc,* which was denied by Order dated January 17, 1991.

Thereafter, by Opinion and Order filed on May 2, 1991, the District Court vacated the § 1406(a) transfer. Further, *inter alia,* the District Court (1) denied Shushan's motion to transfer pursuant to § 1404(a), and (2) dismissed the suit for lack of personal jurisdiction.

Carteret filed an appeal with the Third Circuit. In an opinion filed on January 13, 1992, the Third Circuit held that the District Court erred in dismissing Carteret's suit, asserting that New Jersey's exercise of personal jurisdiction "over one who acts tortiously while within the forum state does not deny due process." *Carteret Sav. Bank, FA v. Shushan,* 954 F.2d 141, 142 (3d Cir. 1992). Shushan sought rehearing, which was denied by Order dated February 12, 1992. (*See* Petitioner Appendix at 1a.) On May 11, 1992, Shushan filed the instant petition for a writ of certiorari.

C. Petitioners' Misstatements of Fact and Law

Shushan makes several misstatements of fact and law in the petition to this Court. The most egregious misstatements are (1) Shushan's recitation of the "questions presented" to this Court

by the Third Circuit ruling, and (2) the characterization of the meeting that Shushan attended in New Jersey, wherein he committed a fraud against Carteret, as "random."

Shushan identifies one of the questions presented herein to be "whether a naked assertion of alleged fraudulent conduct in a first pleading is sufficient to confer jurisdiction over an out-of-state defendant." Shushan's argument improperly intertwines Carteret's substantive claim with the jurisdictional issue. Carteret's allegations regarding Shushan's fraudulent conduct must be accepted as true for the purpose of deciding Shushan's motion to dismiss; Carteret is not required to prove its case at this stage of the proceedings.

All that is required of Carteret in the face of a motion to dismiss for lack of personal jurisdiction is the production of facts establishing Shushan's contacts with the forum state. This requirement was satisfied by the submission of detailed affidavits regarding Shushan's fraud during the meeting in New Jersey and the various other substantial contacts with New Jersey that Shushan had during the course of his representation of Carteret.

Moreover, the record below clearly reflects that Carteret has done more than "nakedly assert" fraudulent conduct. As the Third Circuit observed, Carteret filed with the District Court sworn affidavits, which fully support the allegations of Carteret's Complaint respecting Shushan's fraudulent conduct.

Furthermore, Shushan's depiction of the New Jersey meeting as a "random" chance meeting is erroneous. Shushan concedes that he came to New Jersey to meet with his client, Carteret, for the purpose of reviewing the draft loan documents relating to the $82 million loan to Three Lakeway. Thus, Shushan's characterization of the meeting as "random" is not supported by the facts in the record.

Shushan's petition contains additional misstatements of fact. Shushan refers to the action below as a malpractice suit; however, Carteret alleges a breach of fiduciary duty (Count One) and unlawful, deliberate misrepresentations and intentional nondisclosures, *i.e.*, fraudulent misrepresentation (Count Two). Shushan contends that the trial in New Jersey would be a hardship on potential witnesses; this assertion ignores the ten affidavits and certifications from potential witnesses that were filed by Carteret with the District Court and which were referred to by the Third Circuit, wherein six witnesses stated they were willing to travel to New Jersey for deposition and trial and four stated New Jersey would be the more convenient location for them. (*See* Petitioner Appendix at 38a.) Finally, Shushan urges that the forum selection clause in the Contractor's Consent Agreement is evidence supporting Louisiana jurisdiction over this matter. However, because Shushan was not a party to such agreement, the forum selection clause is irrelevant to this action.

Shushan's petition also contains misstatements with regard to the procedural history of this matter. First, Carteret did not join Shushan and the Shushan Firm in the prior litigation in which the judgment on the guarantee was entered against Carteret. Second, the District Court did not dismiss this action on June 29, 1989; it found that it could not exercise personal jurisdiction over the defendants and transferred the suit to the Eastern District of Louisiana. Finally, when the District Court ruled in 1991 that the action should be dismissed for lack of personal jurisdiction, the District Court also denied Shushan's motion to transfer the action pursuant to § 1404(a).

Among the misstatements of law made in Shushan's petition are two significant misstatements which are frequently repeated. First, Shushan asserts that he could not have committed an act of fraudulent misrepresentation at the May 29, 1985 meeting in New Jersey with Carteret because he made no specific

representations with regard to the newly-inserted clause in the Contractor's Consent Agreement that conferred a benefit to his other client, Algernon Blair. As the Third Circuit properly noted, "This is precisely the crux of Carteret's fraudulent misrepresentation claim: Carteret relied upon the professional judgment of Shushan and his law firm to represent it with respect to the closing. Carteret also relied upon Shushan to apprise Carteret of unfavorable contract language and Shushan's failure to do so, where combined with the possibility of a motivating conflict of interest, allegedly created Carteret's liability which resulted in a judgment in excess of $1.4 million." (*See* Petitioner Appendix at 20a-21a.) Under New Jersey law, a party with a fiduciary duty to another party has committed a fraud whether it flows from a fraudulent misrepresentation *or a fraudulent omission.*

Second, Shushan repeatedly argues that any fraud committed would have been committed in Louisiana, and thus jurisdiction could not lie in New Jersey. This argument ignores the holding of *Calder v. Jones,* 465 U.S. 783 (1984). Under *Calder,* in actions involving intentional torts (such as the one at bar), personal jurisdiction is proper in jurisdictions where the "effects" of the intentional tort are felt. The effects of Shushan's intentional tort of fraud were borne by Carteret in New Jersey. Hence, personal jurisdiction would be proper in New Jersey under *Calder* even if Shushan had not committed a fraud in New Jersey.

Additionally, the petition misconstrues the holdings of a number of cases. For example, petitioners seek to support their argument with the case of *United States Golf Ass'n v. United States Amateur Golf Ass'n,* 690 F. Supp. 317 (D.N.J. 1988). That court, however, found that the defendant's contacts gave rise to jurisdiction in New Jersey but transferred the matter to another forum. Petitioners also seek refuge in various lower New Jersey court decisions discussing challenges to jurisdiction. However,

those cases rejected jurisdiction either because the wrong-doing or the parties had no requisite connection to New Jersey or because, in one instance, jurisdiction would not comport with the dictates of "fair play and substantial justice." As observed by the Third Circuit and *supra*, this clearly is not so in the case at bar.

Also, petitioners misstate a crucial aspect of the Third Circuit's ruling. Whereas petitioners assert that Louisiana law would govern this action, the Third Circuit ruled that New Jersey law would apply to the fraud claim (Count Two of Carteret's Complaint).

REASONS FOR DENYING THE WRIT

I.

PETITIONERS HAVE FAILED TO PRESENT THIS COURT WITH A BASIS FOR GRANTING THEIR PETITION FOR A WRIT OF CERTIORARI.

The considerations governing United States Supreme Court review on a writ of certiorari are set forth in Supreme Court Rule 10, which reads, in pertinent part, as follows:

> .1. A review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with a decision of

> another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

While the petition does not cite this rule, or refer specifically to any of the enumerated considerations, the petition does suggest that it seeks the intervention of this Court because the Third Circuit's decision, reversing the District Court and making a finding of personal jurisdiction, conflicts with decisions of the United States Supreme Court. (*See* Petition at 13.)

Upon analysis demonstrated herein, it is clear that the Third Circuit has not misinterpreted any decision of this Court — it has faithfully carried out the principles of *International Shoe, Co. v. Washington*, 326 U.S. 310 (1945) and its progeny. Rather, the petitioners' quarrel is with the facts. Indeed, the petition omits and misstates some crucial facts. Thus, we would restate the petitioners' reason for granting the writ, as set forth on pages 13 and 14 of the petition, in the following language:

> The ostensible reason of exceptional importance for the granting of the petition is the Third Circuit's finding that jurisdiction may be asserted over a Louisiana attorney who, while representing a New Jersey financial institution on an $82 million loan in connection with a real estate mortgage on Louisiana property, committed a fraud in New Jersey at a regularly scheduled conference with a New Jersey financial institution regarding the transaction and who had numerous and varied telephone and letter communications with the New Jersey financial institution in New Jersey.

This restatement highlights the factual differences as seen by the parties. Although we submit that the record is clear, as enunciated by the Third Circuit, this Court should not become involved in evaluating the factual contentions. *See Idaho Dept. of Employment v. Smith,* 434 U.S. 100, 103 (1977)(Stevens, J., dissenting in part) (noting impropriety in granting certiorari on a decision that does not create a conflict among courts and does not involve a question of national importance).

Petitioners have, in fact, recited that no constitutional provisions are at issue with respect to this petition. (*See* Petition at 3.) In short, petitioners have failed to present any "special and important reasons" for this Court to grant their petition for a writ of certiorari.

II.

THE THIRD CIRCUIT CORRECTLY FOUND THAT THE EXERCISE OF PERSONAL JURISDICTION IN NEW JERSEY OVER PETITIONERS IS NOT A VIOLATION OF DUE PROCESS.

The Third Circuit was asked to consider whether the New Jersey long-arm rule confers personal jurisdiction in New Jersey over Louisiana attorneys representing Carteret, a New Jersey financial institution, by virtue of the fact that the attorneys committed a fraud while in New Jersey that caused significant injury to Carteret. The Third Circuit held that "[b]ecause the New Jersey [rule] is coextensive with federal due process, and exercising personal jurisdiction over one who acts tortiously while within the forum state does not deny due process," jurisdiction over this matter is proper in New Jersey. *Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 142 (3d Cir. 1992). The Third Circuit also recognized that this "presents a stronger case for exercising personal jurisdiction over the defendants than the effects test employed in *Calder v. Jones* . . ." 954 F.2d at 148 (citation omitted). The Third Circuit further ruled that Shushan failed to present a compelling case of any other considerations which would render jurisdiction unreasonable. Thus, the holding of the Third Circuit and the underlying reasoning rigidly followed the requirements of the due process clause and the controlling precedent.

A. Defendants Have Had Substantial Purposeful Contacts With New Jersey.

The District Court in New Jersey undisputedly has jurisdiction over a non-domiciliary defendant to the extent allowed under New Jersey law and in accordance with the due process clause. *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 63

(3d Cir. 1984). The New Jersey Supreme Court has interpreted the New Jersey "long-arm" rule to permit jurisdiction to be exerted over an out-of-state defendant " 'to the uttermost limits permitted by the United States Constitution.' " *Charles Gendler & Co. v. Telecom Equip. Corp.*, 102 N.J. 460, 469, 508 A.2d 1127, 1131 (1986) (*quoting Avdel Corp. v. Mecure*, 58 N.J. 264, 268, 277 A.2d 207 (1971)).

As the Third Circuit ruled, specific jurisdiction may be exercised over the defendants because its claims are related to and arise from the defendants' contacts with New Jersey. *See Dollar Sav. Bank v. First Sec. Bank of Utah*, 746 F.2d 208, 211 (3d Cir. 1984). This Court also has recognized that the exercise of *in personam* jurisdiction over a non-resident defendant is permissible and does not run afoul of due process if the defendant had

> certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe, 326 U.S. at 316 (citations omitted). In *Hanson v. Denckla*, 357 U.S. 235 (1958), this Court noted:

> [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

357 U.S. at 253. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), this Court again recognized that "purposeful availment" by the non-resident defendant confers jurisdiction, concluding:

> Thus where the defendant "deliberately" has engaged in significant activities within a state or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

471 U.S. at 475-76 (citations omitted). This Court has also observed that the conduct of the non-resident defendant and his contacts with the forum state should be such that he "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). *See also, Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984); *Burger King*, 471 U.S. at 474.

Where — as here — the exercise of "specific jurisdiction" is sought, it must be demonstrated that (i) the defendant purposefully directed his activities at the forum, and (ii) the injuries alleged arose out of or relate to those activities. *Burger King*, 471 U.S. at 472.

The "minimum contacts" test can be satisfied by a *single* act that creates a "substantial connection" with the forum. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). In *McGee*, specific *in personam* jurisdiction was based on defendant's transmittal by mail of a *single* insurance contract to the plaintiff in the forum state. Such contact was found to have had the requisite "substantial connection with the State." 355 U.S. at 223.

There is no dispute that Shushan met with Carteret *in New Jersey* on May 29, 1985. The purpose of the meeting was to review

and "finalize" the Three Lakeway loan documents. One of these documents was the Contractor's Consent Agreement. Shushan's concealment *at the New Jersey meeting* of (i) his unauthorized alteration of the Contractor's Consent Agreement, and (ii) his long-standing and on-going legal representation of Algernon Blair, are the foundation stones of Carteret's claims. Carteret's Complaint further alleges that *during the meeting in New Jersey*, Shushan intentionally and deliberately caused Carteret harm by intentionally failing to advise Carteret of the potential consequences of such alteration. Shushan's deliberate, fraudulent and tortious actions in New Jersey are a "substantial connection" with the forum state and *require* that personal jurisdiction be found over defendants. *See McGee*, 355 U.S. at 223.

Petitioners argue that the Third Circuit's ruling in *Gehling v. St. George's School of Medicine*, 773 F.2d 539 (3d Cir. 1985), is "inapposite and was clearly decided in an 'international' contacts context [sic]." The Third Circuit correctly found that *Gehling* supports its decision herein. 954 F.2d at 148-150. In *Gehling*, the Third Circuit found that a defendant was subject to specific jurisdiction with respect to a claim of fraudulent misrepresentation that allegedly occurred during the defendant's single visit to the forum state and the only contact with plaintiffs within the forum state. In *Gehling*, the plaintiffs brought suit against a West Indian medical school after their son died following his participation in a school-sponsored race. Plaintiffs alleged, *inter alia*, that upon accompanying their deceased son's body to Pennsylvania, the Chancellor of the Medical School misrepresented to them the cause of death. The Court stated:

> *Having traveled to Pennsylvania to return decedent's body, [defendants] clearly availed themselves of the "privilege of acting within" Pennsylvania.* Furthermore, with respect to this claim the [defendants] could reasonably have

> anticipated being haled into court in Pennsylvania to answer for their alleged injurious misrepresentation. Finally, *the cause of action arises from defendants' in-state activities, and the defendants' misrepresentation, which occurred and caused injury in Pennsylvania to Pennsylvania residents,* has a sufficient connection to meet the fair play and substantial justice standard of *International Shoe.*

773 F.2d at 544 (emphasis added). Here, Shushan traveled to New Jersey in order to review with Carteret the Three Lakeway construction loan and made fraudulent misrepresentations while he was in New Jersey. Indeed, the three essential elements of the cause of action occurred in New Jersey: (1) the misrepresentation was made in New Jersey; (2) it was relied upon by Carteret in New Jersey; and (3) Carteret was damaged in New Jersey. Therefore, under *Gehling*, jurisdiction over the defendants is proper in New Jersey.

Jurisdiction is also proper under *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696 (3d Cir. 1990). Although the petition suggests otherwise (*see* Petition at 32), the Third Circuit properly considered the *Mesalic* case in rendering its decision below:

> This result is consistent with our recent decision in *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696 (3d Cir. 1990), where we determined that Fiberfloat, a Florida resident, would not be unduly burdened by the expenses of litigating in New Jersey. 897 F.2d at 701. *New Jersey had a valid interest in protecting its residents from damages arising out of the sale by a non-resident of a defectively manufactured product. Id.* We also rejected the proposition that Florida had a more substantial

> interest than New Jersey, or that Fiberfloat's interest outweighed Mesalic's. Specifically, "Fiberfloat purposefully entered the State of New Jersey to carry out activities in an effort to repair Mesalic's boat. These actions are sufficient to distinguish cases where contacts were insufficient to assert personal jurisdiction." *Id.* at 702. Similarly, Shushan purposefully entered New Jersey in order to further his representation of Carteret with respect to the Three Lakeway closing.

954 F.2d at 151 (emphasis added). It is additionally significant that Shushan's contacts came while perpetrating a fraud upon a New Jersey plaintiff, as opposed to the mere negligence involved in *Mesalic*.

The decision of the Third Circuit is also consistent with the holding of the recent, unanimous decision of the New Jersey Supreme Court in *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 558 A.2d 1252 (1989). In *Lebel*, the Court held that the alleged commission of a fraud against a New Jersey plaintiff confers jurisdiction over a non-domiciliary defendant. Indeed, the New Jersey Supreme Court made it abundantly clear that intentional torts — such as Shushan's fraudulent conduct — require less contacts than other types of torts. The *Lebel* Court stated:

> *Remember* that in this case it is alleged that the defendant's representations via mail and telephone to New Jersey were *fraudulent*.

115 N.J. at 326, 558 A.2d at 1256 (emphasis added). The Court also noted:

> Where a defendant knowingly sends into a state a false statement, intending that it should then be

> relied upon to the injury of a resident of that state, *he has, for jurisdictional purposes, acted within that state.*

115 N.J. at 326, 558 A.2d at 1256 (*quoting Vishay Intertechnology, Inc. v. Delta Int'l Corp.*, 696 F.2d 1062, 1066 (4th Cir. 1982)) (emphasis added).

Petitioners rely heavily on two cases which, they contend, weigh against the exercise of personal jurisdiction by New Jersey in the case at bar. First, petitioners cite to *Washington v. Magazzu*, 216 N.J. Super. 23, 522 A.2d 1013 (App. Div. 1987). There, plaintiffs retained Joseph Magazzu, a New Jersey attorney, to represent them in a medical malpractice action against a Virginia hospital. Magazzu communicated with John Wicker, a Virginia attorney and requested that he represent plaintiffs in Virginia. Unfortunately for the plaintiffs, the statute of limitations expired prior to commencement of suit. Plaintiffs brought a legal malpractice suit against Magazzu and the estate of the then deceased Virginia attorney, Wicker. Wicker's sole contacts with New Jersey were that he wrote several letters to Magazzu in New Jersey. Significantly, the Court found that the letters alone showed that Wicker had "purposefully established minimum contacts within New Jersey . . ." 216 N.J. Super. at 27, 522 A.2d at 1016. Yet, the *Washington* court declined to exercise personal jurisdiction because of the *Burger King* considerations of fair play and substantial justice; the Court noted that the "trial within a trial" which would result, as Virginia law would govern the underlying malpractice action, would make the exercise of jurisdiction unreasonable. *Id.* Of course, as the Third Circuit recognized, no such difficulty is presented herein because the allegedly tortious conduct occurred in New Jersey and, thus, New Jersey law would govern. 954 F.2d at 151.

Petitioners' reliance on *Reliance Steel Prods. Co. v. Watson,*

Ess, Marshall & Enggass, 675 F.2d 587 (3d Cir. 1982) is also misplaced. In fact, the rationale of the *Reliance Steel* court supports Carteret's position. In *Reliance Steel*, a Pennsylvania plaintiff brought a breach of contract and legal malpractice action against its former Missouri attorneys. (Of course, Carteret's principal claim of fraud sound in tort.) The *only* "contacts" by the non-resident attorneys were the placing of an advertisement in the *Martindale Hubbell Law Directory* that circulates in the forum and the attorneys' phone calls and rendering of a bill to its Pennsylvania clients. The non-resident attorney *never travelled to Pennsylvania* to meet with their clients to render legal representation and *did not communicate by mail to Pennsylvania* in order to provide legal advice. Further, the cause of action related solely to an alleged negligent handling of a replevin action in Kansas. The property was located in Kansas and the order of replevin was issued in Kansas. 675 F.2d at 589. The *Reliance Steel* court found, on the basis of the factual record, that Pennsylvania had the "least significant contacts" to the claims asserted and, therefore, denied jurisdiction. The Third Circuit recognized that, in stark contrast to *Reliance Steel*, the record here establishes that Shushan purposefully availed himself of the privileges of acting within New Jersey by traveling to New Jersey to consult with his client. 954 F.2d at 149-150.

Petitioners argue that they did not purposely avail themselves of the privileges of acting in New Jersey, as required by *Hanson v. Denckla*, 357 U.S. at 253. (*See* Petition at 27-30.) Petitioners seek to minimize the Third Circuit's findings that Shushan had significant contacts with New Jersey. However, the record is clear. Shushan traveled to New Jersey for a regularly scheduled meeting with Carteret and committed a fraud *at that meeting*. Only after that meeting did Carteret close on the $82 million dollar loan. Finally, Shushan made numerous telephone calls and repeatedly sent letters to New Jersey. Petitioners thereby purposely availed themselves of the privileges of acting within the forum state, as

the Third Circuit recognized when it ruled that personal jurisdiction over defendants existed in New Jersey. 954 F.2d at 149-150.

B. Jurisdiction Is Also Proper Over Defendants Under The "Effects" Doctrine.

The District Court in New Jersey can also exercise personal jurisdiction over defendants under the "effects" doctrine, as enunciated by this Court in *Calder v. Jones*, 465 U.S. 783 (1984). In *Calder*, the plaintiff brought suit in California, her state of residence, against Calder (the president and editor of *The National Enquirer*) and others, alleging libel, invasion of privacy and intentional infliction of emotional distress — *all intentional torts*. 465 U.S. at 783. Defendant Calder moved to dismiss for lack of *in personam* jurisdiction and argued that (i) all of his actions with respect to the libelous article took place in Florida, where he lived and worked and where the newspaper was published, and (ii) he had only been to California twice in his life and both trips were entirely unrelated to the subject matter of the lawsuit. This Court found that jurisdiction was proper over Calder because the complaint did not allege negligence but intentional wrongdoing, which was an altogether different matter:

> [P]etitioners are not charged with *mere untargeted negligence*. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California.

465 U.S. at 789 (emphasis supplied). Further, this Court held:

> In this case, petitioners are primary participants in an alleged wrongdoing *intentionally directed at a California resident*, and jurisdiction over them is proper *on that basis*.

465 U.S. at 790 (emphasis supplied). It cannot be stated more clearly: when a complaint charges intentional wrongdoing, directed at a specific person or entity in another state, and that person is injured, there is personal jurisdiction.

New Jersey courts have adopted the "effects" doctrine. *See Blessing v. Prosser*, 141 N.J. Super. 548, 550, 359 A.2d 493, 494 (App. Div. 1976); *Moon Carrier v. Reliance Ins. Co.*, 153 N.J. Super. 312, 325-26, 379 A.2d 517, 524-25 (Law Div. 1977). The *Blessing* Court cited with approval *Restatement (Second) of Conflicts of Laws* § 37, which states:

> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

141 N.J. Super. at 550, 359 A.2d at 494.

Carteret's Complaint sets forth in detail allegations of fraud against Shushan that caused injury to Carteret in New Jersey (*See* Respondent Appendix at 14a-23a.) Therefore, under *Calder*, the intentional, tortious conduct of petitioners, which had harmful "effects" in New Jersey upon a New Jersey plaintiff, requires the exercise of jurisdiction over Shushan. As the Third Circuit recognized, the facts of this case are even more compelling in favor of the exercise of jurisdiction than those in *Calder*, because, unlike in *Calder*, Shushan came into New Jersey to perpetrate his fraud. 954 F.2d at 147-148.

C. Defendants Cannot Present A "Compelling Case" That The Finding Of Jurisdiction Would Be Unreasonable.

The jurisdictional analysis does not end if a court finds sufficient minimum contacts. As this Court stated in *Burger King*:

> Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice."

471 U.S. at 476. These "other factors" are: (1) The forum state's interest in adjudicating the dispute; (2) The plaintiff's interest in obtaining convenient and effective relief; (3) The interstate judicial system's interest in obtaining the most efficient resolution of controversies; (4) The burden on the defendant; and (5) The shared interest of the several states in furthering substantive social policies. *See World-Wide Volkswagen,* 444 U.S. at 292. With regard to this "prong" of the analysis, the *defendant* has the considerable burden of presenting a "compelling case" to overcome the weight of the "minimum contacts" and defeat jurisdiction:

> [W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, *he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.*

Burger King, 471 U.S. at 477 (emphasis added).

The Third Circuit ruled that Shushan did not meet his burden to present a compelling case that, his minimum contacts with the

forum notwithstanding, jurisdiction would be unreasonable. Further, a review of the "relevant factors" identified by this Court in *World-Wide Volkswagen* and *Burger King* strongly favors the exercise of jurisdiction over petitioners.

One factor to consider is the interest of the New Jersey forum in adjudicating the dispute between Carteret and petitioners. New Jersey has a "significant interest in adjudicating fraudulent misrepresentations occurring within its boundaries," as noted by the Third Circuit. 954 F.2d at 150. New Jersey's interest is heightened because the intentional tort was committed on a New Jersey financial institution, which maintains its headquarters in New Jersey, which maintains various branches and offices in New Jersey, and which employs hundreds of New Jersey citizens. The petitioners' repeated assertion that the omission or failure to discuss a material provision of the Contractor's Consent Agreement could not be considered an intentional or fraudulent misrepresentation is a misstatement of a well-settled New Jersey law. *See, e.g., Medivox Prod., Inc. v. Hoffman-LaRoche, Inc.*, 107 N.J. Super. 47, 69-70 (Law Div. 1969), wherein Judge (now New Jersey Supreme Court Justice) Handler wrote that "[a] fraudulent misrepresentation may inhere in a statement which is truthful so far as it goes but which is materially misleading because of the failure to recite qualifying matters . . . [and thus] intentional concealment of material information is tantamount to an affirmative misrepresentation of the non-existence of such information." The Third Circuit held that, because Shushan's allegedly tortious conduct occurred in New Jersey, the law of New Jersey with regard to fraud, would, in fact, govern. 954 F.2d at 151. Petitioners incorrectly assert that Louisiana law would apply. (*See* Petition at 40.)

A second consideration is the plaintiff's interest in obtaining convenient and effective relief. Of course, Carteret is a New Jersey institution with its principal place of business in this forum, which

further weighs in favor of New Jersey jurisdiction. *See Charles Gendler & Co. v. Telecom Equip. Corp.*, 102 N.J. at 473, 508 A.2d at 1133.

A third factor to consider is the interstate judicial system's interest in obtaining the most efficient resolution of controversies. This factor was also considered by the Third Circuit, which recognized that Carteret had submitted ten affidavits and certifications from witnesses declaring either that the witnesses were willing to travel to New Jersey for deposition and trial, or that New Jersey would be the *more* convenient location for them; additional sworn testimony stated that all of Carteret's documentation concerning the Three Lakeway project was located in New Jersey. 954 F.2d at 150. Shushan has not presented evidence to rebut any of this testimony.

Indeed, the primary *World-Wide Volkswagen/Burger King* factor on which petitioners focus is the burden to which Shushan would allegedly be subject by a trial in New Jersey. As stated in the Third Circuit opinion below, petitioners "do not explain what burden, other than inconvenience, would be visited upon them should they be required to litigate in New Jersey . . . [and they thereby] misapprehend their burden to make a compelling case against the exercise of personal jurisdiction." 954 F.2d at 150.

The final factor enumerated by this Court is the shared interest of the several states in furthering substantive social policies. While petitioners argue that Louisiana should govern the conduct of Louisiana attorneys, petitioners cannot deny that Louisiana and New Jersey have some shared interest in remedying victims of attorneys who fraudulently deceive their clients.

In sum, petitioners cannot sustain their burden to present a compelling case that jurisdiction in New Jersey would be unreasonable.

CONCLUSION

The petition for a writ of certiorari filed by Shushan and the Shushan Firm should be denied.

Respectfully submitted,

ANTHONY J. SYLVESTER
Counsel of Record

VITO A. GAGLIARDI, JR.
On the Brief

RIKER, DANZIG, SCHERER,
HYLAND & PERRETTI
Attorneys for Respondent
CARTERET SAVINGS BANK, FA

DATED: June 8, 1992

APPENDIX A — COMPLAINT DATED DECEMBER 5, 1989

[Stamped
ORIGINAL FILED
DEC 5 1988
William T. Walsh, Clerk]

RIKER, DANZIG, SCHERER, HYLAND & PERRETTI
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ATTORNEYS FOR Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 88-5178 (NHP)

CARTERET SAVINGS BANK FA,

Plaintiff,

vs.

LOUIS J. SHUSHAN, DONALD A. MEYER, RADER JACKSON, JACQUELINE McPHERSON, MITCHELL W. HERZOG and SHUSHAN, MEYER, JACKSON, McPHERSON and HERZOG,

Defendants.

COMPLAINT

Plaintiff, by way of complaint against defendants, says:

Appendix A

1. Plaintiff Carteret is a Federal association organized and existing under the laws of the United States, and having its principal place of business at 200 South Street, Morristown, New Jersey.

2. Defendants Louis J. Shushan ("Shushan"), Donald A. Meyer, Rader Jackson, Jacqueline McPherson and Mitchell W. Herzog are persons of the full age of majority domiciled in New Orleans, Louisiana.

3. Defendant, the law firm of Shushan, Meyer, Jackson, McPherson and Herzog, is a Louisiana partnership having its principal place of business in New Orleans, Louisiana ("the Shushan Firm").

JURISDICTION AND VENUE

4. The jurisdiction of this Court is invoked under 28 U.S.C. 1332(a) in that the amount in controversy exceeds $10,000.00, exclusive of costs and interest, and that the parties are citizens of different states.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391 in that the claims arose in this district and plaintiff resides in this district.

COUNT ONE

6. On June 12, 1985, Carteret entered into a construction loan agreement with Three Lakeway Center Partnership ("Three Lakeway"), pursuant to which Carteret agreed to provide financing for the construction of a multi-use project ("the Project") being developed by Three Lakeway in Metairie,

Louisiana. On the same day, Three Lakeway entered into a construction contract ("the Construction Contract") with Algernon Blair, Inc. ("Blair"), pursuant to which Blair agreed to construct the Project.

7. On June 12, 1985, Three Lakeway and Carteret also entered into a collateral assignment ("the Collateral Assignment"), pursuant to which Three Lakeway assigned all of its rights and interests under the Construction Contract to Carteret as partial security for Three Lakeway's obligations under the construction loan agreement. On the same day, Blair and Carteret entered into a contractor's consent and certification agreement ("the Contractor's Consent"), pursuant to which Blair acknowledged and consented to the Collateral Assignment.

8. In a civil action pending in the United States District Court for the Eastern District of Louisiana entitled "SNS Contractors, Inc. v. Algernon Blair, Inc.," No. 88-1371 ("the Blair Litigation"). Blair has asserted against Carteret a third-party demand in the amount of $2,940,985. In its third-party demand, Blair asserts that Carteret is liable to Blair under the terms of the Contractor's Consent.

9. Although Carteret has denied all liability to Blair, in the event that Carteret is cast in judgment to Blair for any amount pursuant to the Contractor's Consent, then defendants are liable to Carteret in the same amount for the following reasons.

10. Shushan and the Shushan firm acted as legal counsel for Carteret in connection with the negotiation and legal execution of the Contractor's Consent that serves as the basis for Blair's claim against Carteret. In this regard, Shushan and the Shushan firm acted as Carteret's sole contacts with Blair with respect to the terms of the Contractor's Consent. In the course of their

representation of Carteret, Shushan and the Shushan firm breached the fiduciary duties they owed to Carteret in the following non-exclusive respects:

(a) By failing to fully disclose to Carteret the nature and extent of their prior and ongoing legal representation of Blair in connection with other matters and to obtain Carteret's consent to this conflict of interest;

(b) By failing to advise Carteret that they could not properly negotiate the terms of the Contractor's Consent with Blair on Carteret's behalf by reason of their conflicts of interest and that Carteret should retain other counsel for that purpose;

(c) By failing to protect adequately Carteret' interests during negotiations with Blair with respect to the Contractor's Consent, and by agreeing on Carteret's behalf to terms in the Contractor's Consent that were grossly unfavorable to Carteret and favorable to Blair;

(d) By failing to inform Carteret that the terms of the Contractor's Consent were grossly unfavorable to Carteret in relation to the relative bargaining powers of the parties and/or by misrepresenting to Carteret the nature of their negotiations with Blair concerning the terms of the Contractor's Consent; and

(e) By failing to inform Carteret adequately of the potential adverse legal effects of the Contractor's Consent.

11. Defendants Meyer, Jackson, McPherson and Herzog are liable to plaintiff for the acts and conduct of Shushan and the Shushan firm.

Appendix A

12. Had defendants not breached the fiduciary duties they owed to Carteret, Carteret would not have executed the Contractor's Consent in its present form and, therefore, Carteret would not be liable to Blair under the terms of the Contractor's Consent. Accordingly, any loss suffered by Carteret by reason of the Contractor's Consent was directly caused by the breaches of fiduciary duties by Shushan and the Shushan Firm.

WHEREFORE, plaintiff Carteret demands judgment against defendants (i) in the same amount, if any, for which Carteret is cast in judgment to Blair in the Blair Litigation, plus all costs incurred by Carteret in connection with the Blair Litigation; and (ii) for all other relief to which Carteret is entitled.

DEMAND FOR TRIAL BY JURY

Plaintiff demands trial by jury as to all issues so triable.

RIKER, DANZIG, SCHERER,
HYLAND & PERRETTI
Attorneys for Plaintiff

By: s/ Gerald A. Liloia
GERALD A. LILOIA

Appendix A

CERTIFICATION UNDER R. 4:5-1

The matter in controversy is not the subject of any other action pending in any court or of a pending arbitration proceeding except for the action referred to in paragraph 8 of this Complaint. No other action or arbitration proceeding is presently contemplated.

RIKER, DANZIG, SCHERER,
HYLAND & PERRETTI
Attorneys for Plaintiff
Carteret Savings Bank FA

By: s/ Gerald A. Liloia
GERALD A. LILOIA

Dated: December 5, 1988.

Appendix A

CERTIFICATION UNDER GENERAL RULE 47

I hereby certify that upon my knowledge of the facts and the applicable law and pursuant to Rule 47 C.4. of the General Rules of this court, the damages recoverable in this action exceed the sum of $75,000.00 exclusive of interest, costs, and any claim for punitive damages.

s/ Gerald A. Liloia
GERALD A. LILOIA

Dated: December 8, 1988.

APPENDIX B — ANSWER DATED JANUARY 24, 1989

TOMPKINS, MCGUIRE & WACHENFELD
FOUR GATEWAY CENTER
100 MULBERRY ST.
NEWARK, N.J. 07102-4070
(201) 622-3000
ATTORNEYS FOR Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 88-5178(NHP)

CARTERET SAVINGS BANK FA,

Plaintiff,

v.

LOUIS J. SHUSHAN, DONALD A. MEYER, RADER JACKSON, JACQUELINE McPHERSON, MITCHELL W. HERZOG and SHUSHAN, MEYER, JACKSON, McPHERSON and HERZOG,

Defendants.

ANSWER, DEMAND FOR JURY TRIAL AND DAMAGES

Defendants, Louis J. Shushan, Donald A. Meyer, Rader Jackson, Jacqueline McPherson, Mitchell W. Herzog and Shushan, Meyer, Jackson, McPherson and Herzog, located in the State of Louisiana, by way of answer to the Complaint filed herein, alleges and says:

1. The First Paragraph does not contain any allegations

against these defendants and, therefore, no responsive pleading is necessary.

2. Defendants admit the allegations of Paragraph Two.

3. Defendants admit the allegations of Paragraph Three.

JURISDICTION AND VENUE

4. Defendants deny the allegations of Paragraph Four.

5. Defendants deny the allegations of Paragragh Five.

COUNT ONE

6. The Sixth Paragraph does not contain any allegations against these defendants and, therefore, no responsive pleading is necessary.

7. The Seventh Paragraph does not contain any allegations against these defendants and, therefore, no responsive pleading is necessary.

8. The Eighth Paragraph does not contain any allegations against these defendants and, therefore, no responsive pleading is necessary.

9. Defendants deny the allegations of Paragraph Nine.

10. Defendants deny the allegations of Paragraph Ten in its entirety.

11. Defendants deny the allegations of Paragraph Eleven.

Appendix B

12. Defendants deny the allegations of Paragraph Twelve.

SEPARATE DEFENSES

FIRST SEPARATE DEFENSE

There is lack of jurisdiction over the person of the defendants by reason of insufficiency of minimal contact.

SECOND SEPARATE DEFENSE

There is lack of jurisdiction over the person of the defendants by reason of insufficiency of process and insufficiency of service of process.

THIRD SEPARATE DEFENSE

Any and all damages sustained were the result of a third party over whom these defendants had no control.

FOURTH SEPARATE DEFENSE

The claim of the plaintiff is barred as a matter of law because of the doctrine of res judicata.

FIFTH SEPARATE DEFENSE

Plaintiffs are collaterally estopped from bringing this litigation because the facts and circumstances which give rise to this litigation have been adjudicated and determined by the United States Court for the Eastern District of Louisiana and *S&S Contractors, Inc. v. Algenon Blair, Inc.*, Civil Action No. 88-1372 Section "H" Magistrate Division 5 consolidated with *Fishback & Moore, Inc.*

Appendix B

v. Algenon Blair Inc. et al., Civil Action No. 88-1424, Section "H", Magistrate Division 5.

SIXTH SEPARATE DIVISION

The applicable law, rule, statute or regulation, including, but not limited to, the statute of limitations, controlling or requiring the institution of suit with any certain period of time following its accrual was not complied with by the plaintiff, and, accordingly, the plaintiff's claim is barred as a matter of law.

SEVENTH SEPARATE DEFENSE

The rights and remedies of the parties to this action are controlled by the laws of the State of Louisiana.

EIGHTH SEPARATE DEFENSE

The claimant was guilty of contributory negligence and failing to exercise due and proper care under the existing circumstances and conditions.

NINTH SEPARATE DEFENSE

The Complaint herein fails to state a claim upon which relief can be granted and these defendants reserve the right to move at or before the time of trial to dismiss the Complaint.

TENTH SEPARATE DEFENSE

Venue in this forum is improper since it would cause an undue burden and hardship to the defendants and any witnesses on their behalf in litigating this matter within this forum. All the acts and

events which give rise to this litigation occurred within the State of Louisiana.

ELEVENTH SEPARATE DEFENSE

Subsequent to the incident complained of, plaintiff answered to the proceeding before another tribunal possessing jurisdiction over the incident complained of, and has thus elected a remedy different and repugnant to the remedy sought herein.

WHEREFORE, defendants demand judgment dismissing the plaintiff's Complaint.

JURY DEMAND

Defendants demand trial by jury on all issues.

DEMAND FOR DAMAGES

Pursuant to U.S. District Court Rule 8(g) these defendants demand a statement of damages within ten (10) days.

TOMPKINS, McGUIRE &
WACHENFELD
Attorneys for Defendants

By: s/ Charles F. Brennan
Charles F. Brennan

Dated: 1/24/89

Appendix B

CERTIFICATION

The matter in controversy is not the subject of any other action pending in any court or of a pending arbitration proceeding except *S&S Contractors, Inc. v. Algenon Blair, Inc., et al.*, Civil Action No. 88-1372, Section "H", Magistrate Division 5 consolidated with *Fishback and Moore, Inc.v. Algenon Blair, Inc., et al.*, Civil Action No. 88-1424, Section "D", Magistrate Division 5 before the United States District Court for the Eastern District of Louisiana. No other action or arbitration proceeding is presently contemplated.

TOMPKINS, McGUIRE &
WACHENFELD
Attorneys for Defendants

By: s/ Charles F. Brennan
Charles F. Brennan

DATED: 1/24/89

APPENDIX C — FIRST AMENDED COMPLAINT DATED JUNE 15, 1991

RIKER, DANZIG, SCHERER & HYLAND
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
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Attorneys for Plaintiff,
CARTERET SAVINGS BANK, FA

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 88-5178 (NHP)

CARTERET SAVINGS BANK, FA,

Plaintiff,

v.

LOUIS G. SHUSHAN, DONALD A. MEYER, RADER JACKSON, JACQUELINE McPHERSON, MITCHELL W. HERZOG and SHUSHAN, MEYER, JACKSON, McPHERSON and HERZOG,

Defendants.

FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Carteret Savings Bank, FA ("Carteret"), by way of First Amended Complaint against defendants, says:

Appendix C

1. Carteret is a Federal Association organized and existing under the laws of the United States, and has its principal place of business at 200 South Street, Morristown, New Jersey.

2. Defendants Louis J. Shushan ("Shushan"), Donald A. Meyer, Rader Jackson, Jacqueline McPherson and Mitchell W. Herzog (hereinafter the "Defendants"), are persons of the full age of majority, and, upon information and belief, domiciled in New Orleans, Louisiana.

3. Defendant Shushan, Meyer, Jackson, McPherson and Herzog is a Louisiana Partnership having its principal place of business in New Orleans, Louisiana (the "Shushan Law Firm").

JURISDICTION AND VENUE

4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1332(a) in that the amount in controversy exceeds $10,000.00, exclusive of costs and interest, and that the parties are citizens of different states.

5. Venue is proper in this District pursuant to 28 U.S.C. § 1391 in that the claims arose in this District, and Carteret's principal place of business is located in this District.

COUNT ONE

6. On June 12, 1985, Carteret entered into a Construction Loan Agreement with Three Lakeway Center Partnership ("Three Lakeway"), pursuant to which Carteret agreed to provide financing for the construction of a multi-use project ("the Project") being developed by Three Lakeway in Metairie, Louisiana. On the same day, Three Lakeway entered into a

Construction Contract (the "Construction Contract") with Algernon Blair, Inc. ("Algernon Blair"), pursuant to which Algernon Blair agreed to act as the general contractor on the Project.

7. On June 12, 1985, Three Lakeway and Carteret also entered into a collateral assignment (the "Collateral Assignment"), pursuant to which Three Lakeway assigned to Carteret all of its rights and interests under the Construction Contract as partial security for Three Lakeway's obligations under the Construction Loan Agreement.

8. Also, on June 12, 1985, Algernon Blair and Carteret entered into a Contractor's Consent and Certification Agreement (the "Contractor's Consent"), pursuant to which, *inter alia*, Algernon Blair acknowledged and consented to the Collateral Assignment.

9. In a civil action brought in the United States District Court for the Eastern District of Louisiana entitled *SNS Conractors, Inc. v. Algernon Blair, Inc.*, Civil Action No. 88-1371 (the "Algernon Blair Litigation"), Algernon Blair asserted against Carteret a third-party demand in the amount of $2,940,985. In such demand, Algernon Blair asserted that Carteret was liable to Algernon Blair under the terms of the Contractor's Consent.

10. Although Carteret had denied all liability to Algernon Blair, judgment was entered in the Algernon Blair Litigation in favor of Algernon Blair and against Carteret in the amount of $1,498,304.

11. Shushan and the Shushan Firm acted as legal counsel for Carteret in connection with the negotiation and execution of the

Appendix C

Contractor's Consent that served as the basis for (a) Algernon Blair's claim against Carteret and (b) the Court's finding in the Algernon Blair Litigation of liability on the part of Carteret and entry of judgment against Carteret.

12. As Carteret's legal counsel as aforesaid, Shushan and the Shushan Firm acted as Carteret's sole contacts with Algernon Blair with respect to the terms of the Contractor's Consent. In the course of their representation of Carteret as aforesaid, Shushan and the Shushan Firm intentionally breached the fiduciary duties owed to Carteret in the following nonexclusive respects:

(a) By failing to fully disclose to Carteret the nature and extent of their prior and ongoing legal representation of Algernon Blair in connection with other matters and to obtain Carteret's waiver of this conflict of interest;

(b) By failing to advise Carteret that they could not properly negotiate on Carteret's behalf the terms of the Contractor's Consent with Algernon Blair by reason of their conflict of interest and that Carteret should retain other legal counsel for that purpose.

(c) By failing to protect adequately Carteret's interest during negotiations with Algernon Blair with respect to the Contractor's Consent, and by agreeing on Carteret's behalf to terms in the Contractor's Consent that were grossly unfavorable to Carteret and, instead, favorable to Algernon Blair;

(d) By modifying and amending the terms of the Contractor's Consent, without notice to or the authorization of Carteret, so as to incorporate language pursuant to which the Court in the Algernon Blair Litigation found Carteret to be liable to Algernon Blair for certain payments totaling in the aggregate $1,498,304;

(e) By failing to inform Carteret that the terms of the Contractor's Consent were grossly unfavorable to Carteret in relation to the relative bargaining powers of the parties and/or by intentionally misrepresenting to Carteret the nature of their negotiations with Algernon Blair concerning the terms of the Contractor's Consent; and

(f) By failing to adequately inform Carteret of the potential adverse legal effects of the terms of Contractor's Consent, as modified by defendants without Carteret's knowledge or consent.

13. Defendants Meyer, Jackson, McPherson and Herzog are each liable to plaintiff for the wrongful acts and conduct of Shushan and the Shushan Firm.

14. Had defendants not breached fiduciary duties owed to Carteret, Carteret would not have entered into the Contractor's Consent in the form executed and, therefore, Carteret would not have been found liable to Algernon Blair under the terms of the Contractor's Consent. Accordingly, the losses suffered, including, but not limited to, those related to the judgment entered in the

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Algernon Blair Litigation, were directly and proximately caused by the wrongful conduct and breach of fiduciary duties by Shushan and the Shushan Firm.

WHEREFORE, plaintiff Carteret demands that judgment be entered in its favor against defendants, jointly and severally: (i) in the amount of $1,498,304.00, plus all costs incurred by Carteret, including attorneys' fees, in connection with the Algernon Blair Litigation; and (ii) for all other relief to which Carteret is entitled.

COUNT TWO

15. Plaintiffs reallege and incorporate paragraphs one through fourteen as if set forth herein at length.

16. Prior to May 29,1985, Louis Shushan and the Shushan Firm, without notice to or the consent of Carteret, and in order to benefit the financial interest of Algernon Blair, modified and altered the Conractor's Consent so as to incorporate the following provision:

> Notwithstanding the above, in the event of any default by Borrower under the Loan Agreement as aforesaid, Lender agrees that the Contractor shall be paid for the work done by it up to the date of such default and termination of the Construction Contract by Lender, including a pro-rata share of its construction fee and retainage.

As a direct result of this provision, which the Court found to be a guarantee by Carteret of the obligation of Three Lakeway to Algernon Blair, the Court in the Algernon Blair Litigation found

that Carteret was liable to Algernon blair in the amount of $1,498,304.

17. Shushan and the Shushan Firm did not request and did not obtain consent or authorization from Carteret to modify and alter the Contractor's Consent, as aforesaid.

18. On May 29, 1985, Shushan met with Carteret and Carteret's counsel in Roseland, New Jersey, at the offices of Carteret's New Jersey counsel, for the purpose of rendering legal advice to Carteret and reviewing and finalizing all documents relating to the Three Lakeway Construction Loan, including, but not limited to, the Contractor's Consent. Shushan knew at that and all other relevant times that Carteret was relying upon him and his Firm to represent Carteret's best interests, without any consideration to any competing or conflicting interests of any other person or entity involved in the Three Lakeway Project.

19. At the said May 29, 1985 meeting with Carteret and at all other times throughout his representation of Carteret in connection with the Three Lakeway Construction Loan, Shushan intentionally failed to disclose to Carteret (a) the fact of and details relating to his professional relationship with and prior and/or current representation of Algernon Blair, as well as his personal relationship with its senior executives; (b) the unauthorized modification he had made to the Contractor's Consent, as aforesaid; and (c) the potential legal effect and consequences to Carteret of such unauthorized modification.

20. Shushan and the Shushan Firm acted wrongfully at the May 29, 1985 New Jersey meeting and at all other relevant times during the course of its representation of Carteret, in the following non-exclusive respects:

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(a) by deliberately failing to disclose to Carteret and others present that they had amended the Contractor's Consent to the benefit of Algernon Blair and to the detriment of Carteret;

(b) by deliberately failing to secure Carteret's consent to the amendment;

(c) by intentionally failing to inform and advise Carteret of the purpose and legal consequences of the unauthorized amendment to the Contractor's Consent;

(d) by concealing from Carteret their prior communications with Algernon Blair concerning the Contractor's Consent;

(e) by intentionally failing to disclose their long-standing professional and personal relationship with Algernon Blair; and

(f) by taking deliberate actions to benefit their long-standing client, Algernon Blair, to the significant detriment of Carteret.

21. Shushan and the Shushan Firm knew that Carteret relied on them to represent its interests and that Carteret could incur substantial liability as a result of Shushan's failure to disclose the unauthorized amendment of the Contractor's Consent and the legal effect thereof and his long-term attorney-client relationship with Algernon Blair.

22. Carteret has been substantially harmed, as set forth in

paragraph 16 hereof, as a result of the wrongful, deliberate conduct of Shushan and the Shushan Firm and its reliance on the misrepresentations and intentional nondisclosures by defendants.

WHEREFORE, plaintiff Carteret demands judgment against defendants (i) in the amount of $1,498,304.00, plus all costs, including attorneys' fees, incurred by Carteret in connection with the Algernon Blair Litigation; (ii) all other compensatory damages; (iii) punitive damages; and (iv) for all other relief to which Carteret may be entitled.

DEMAND FOR TRIAL BY JURY

Plaintiff demands trial by jury as to all issues to triable.

RIKER, DANZIG, SCHERER,
HYLAND & PERRETTI
Attorneys for Plaintiff
CARTERET SAVINGS BANK,
FA

By: s/ Anthony J. Sylvester
ANTHONY J. SYLVESTER

DATED: June 4, 1991

Appendix C

CERTIFICATION UNDER GENERAL RULE 47

I hereby certify that upon my knowledge of the facts and the applicable law and pursuant to Rule 47 C.4. of the General Rules of this Court, the damages recoverable in this action exceed the sum of $100,000 exclusive of interest, costs and any claim for punitive damages.

s/ Anthony J. Sylvester
ANTHONY J. SYLVESTER

DATED: June 4, 1991

APPENDIX D — AFFIDAVIT OF JOSEPH TOCKARSHEWSKI DATED APRIL 14, 1989

RIKER, DANZIG, SCHERER & HYLAND
Headquarters Plaza II
One Speedwell Avenue
Morristown, New Jersey 07962-1981

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 88-5178 (NHP)

CARTERET SAVINGS BANK, FA,

Plaintiff,

vs.

LOUIS J. SHUSHAN, DONALD A. MEYER, RADER JACKSON, JACQUELINE McPHERSON, MITCHELL W. HERZOG and SHUSHAN, MEYER, JACKSON, McPHERSON and HERZOG,

Defendants.

Civil Action

AFFIDAVIT OF JOSEPH TOCKARSHEWSKY

I, JOSEPH TOCKARSHEWSKY, of full age, being duly sworn according to law, upon my oath depose and say:

1. I am presently employed as Executive Vice President of

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American Security Bank, located in Washington, D.C.

2. During the period from approximately February 1982 through May 1985 I was Executive Vice President and Senior Real Estate Loan Officer at Carteret Savings Bank, FA in Morristown, New Jersey. Prior to working with Carteret, I was in charge of the commercial real estate department of Irving Trust Company in New York City.

3. While at Irving Trust we retained Louis Shushan, a New Orleans attorney, to represent us in connection with two or three construction loans in the New Orleans area.

4. In late 1984 John Yemelos called me to determine Carteret's interest in financing a construction project in Metarie, Louisiana known as Lakeway Three. I came to know Mr. Yemelos while at Irving Trust. Irving Trust had provided construction financing for a project known as Lakeway One which was developed by Mr. Yemelos.

5. After review, Carteret decided that it would provide construction financing to the Lakeway Three project. In or about December 1984 I telephoned Mr. Shushan from my office in New Jersey and retained him to represent Carteret in this matter. Mr. Shushan's responsibility was to prepare all necessary closing documents and to do whatever was necessary to protect Carteret's interest with respect to this loan.

6. At approximately the same time, Carteret retained Herb Rinaldi, Esq. of the New Jersey law firm of Carella, Byrne, Bain & Gilfillan for the purpose of preparing the loan commitment letter to Lakeway Three and to provide oversight with respect to the loan documents. Mr. Rinaldi was also asked at a later time

to prepare a participation agreement among the various lenders who participated with Carteret in providing the construction financing to Lakeway Three.

7. The commitment letter set forth the terms and conditions of the loan. It also stated that Algernon Blair, Inc. would be the general contractor for the construction of the project. A copy of the loan commitment letter was sent to Mr. Shushan after it was prepared. At no time did Mr. Shushan tell me that he had represented Algernon Blair in other matters or that he felt there was a conflict of interest in his representing Carteret in a project involving Algernon Blair.

8. At no time from the point of my retaining Mr. Shushan to the time I left the bank in May 1985, did Mr. Shushan tell me that Algernon Blair had requested or insisted that Carteret guarantee the obligations of Three Lakeway to Algernon Blair under the construction contract.

9. At no time did Mr. Shushan discuss with me the terms of the contractors consent agreement nor did I ever authorize Mr. Shushan to insert in the contractors consent agreement a provision that Carteret would guarantee the obligations of Three Lakeway under the construction contract. Had I been asked, I would not have consented to the guarantee.

10. Had Mr. Shushan informed me that he had represented Algernon Blair in the past on any significant matter or that he had a conflict of interest, I would not have retained him to represent Carteret in the Three Lakeway matter.

s/ Joseph B. Tockarshewsky
JOSEPH TOCKARSHEWSKY

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Sworn to and subscribed before me this
14th day of April, 1989.
District of Columbia

s/ Helen M. Kortec
My Commission Expires May 14, 1990

APPENDIX E — AFFIDAVIT OF STEVEN COLE DATED APRIL 25, 1989

RIKER, DANZIG, SCHERER & HYLAND
Headquarters Plaza
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Morristown, New Jersey 07962-1981
(201) 538-0800

Attorneys for Plaintiff,
CARTERET SAVINGS BANK, FA

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 88-5178 (NHP)

CARTERET SAVINGS BANK, FA,

Plaintiff,

v.

LOUIS G. SHUSHAN, DONALD A. MEYER, RADER JACKSON, JACQUELINE McPHERSON, MITCHELL W. HERZOG and SHUSHAN, MEYER, JACKSON, McPHERSON and HERZOG,

Defendants.

AFFIDAVIT OF STEVEN A. COLE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT AND IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT

Appendix E

STATE OF NEW JERSEY)
) : ss.
COUNTY OF MORRIS)

I, STEVEN A. COLE, of full age, being duly sworn according to law, upon my oath, depose and say:

1. I am a Vice President of Carteret Savings Bank, FA ("Carteret"), plaintiff in the above-captioned matter, which has its principal place of business at 200 South Street, Morristown, New Jersey. I am fully familiar with the facts set forth herein and those relating to this action and I submit this Affidavit on behalf of Carteret (i) in support of Carteret's Cross-Motion for leave to file a First Amended Complaint in the form annexed to the Notice of Cross-Motion filed herewith, and (ii) in opposition to defendants' Motion to dismiss the Complaint on the grounds that the Court lacks personal jurisdiction over them.

2. In late 1984, Carteret agreed to enter into a Construction Loan Agreement with Three Lakeway Center Partnership under which it would lend $82 million to Three Lakeway to finance the construction of a "mixed use" building project located in Metairie, Louisiana (hereinafter "Three Lakeway"). There were to be other participating lenders. Carteret acted as the lead lender for the loan.

3: In late 1984, Mr. Joseph Tockarshewsky, at that time an Executive Vice President of Carteret, and I communicated with Louis Shushan, Esq. and his law firm Shushan, Meyer, Jackson, McPherson & Herzog (the "Shushan Firm"), to discuss retaining Shushan, and the Shushan Firm, to represent Carteret and its co-lenders in the negotiation and preparation of the Three Lakeway loan documents. Carteret did, in fact, retain Shushan and the Shushan Firm at that time to perform said legal services.

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4. On May 29, 1985, a meeting was held at the offices of Carella, Byrne, Bain and Gilfillan, in Roseland, New Jersey, which was attended by representatives of the participants to the loan agreement, Louis Shushan, Herbert Rinaldi, Carteret's New Jersey counsel, and me. The purpose of this meeting was, in part, to finalize the numerous loan documents prepared by Mr. Shushan and to hear from Mr. Shushan with respect to any problems relating thereto. Mr. Shushan had been working on these documents for months and we totally relied on him to see to it that Carteret's interests were protected. We also relied on Mr. Shushan and his firm to advise us as to the legal ramifications to Carteret of the construction loan documents to be executed at closing. One of these documents was the Contractor's Consent Agreement between Carteret and Algernon Blair. (Exhibit A hereto.)

5. At no time during this meeting in New Jersey did Shushan inform me that he had modified the terms of the Contractor's Consent Agreement without Carteret's authorization. (Compare paragraph 3(d) of executed agreement, Exhibit A, with the same paragraph of one of the drafts prepared by Mr. Shushan, annexed as Exhibit B hereto.) Mr. Shushan never requested nor was he ever given authority from Carteret to modify the Contractor's Consent Agreement with Algernon Blair so as to provide a guaranty from Carteret to Algernon Blair. Mr. Shushan never told us of any communications with Algernon Blair regarding a modification of the Contractor's Consent Agreement.

6. Furthermore, at no time between the May 29, 1985 meeting in New Jersey and the closing of the Construction Loan on June 12, 1985 did Louis Shushan or anyone at the Shushan Firm inform me or anyone else at Carteret of his unauthorized modification of the Contractor's Consent Agreement or the purpose and

potential legal consequences to Carteret of such modification.

7. Shushan did not advise me at the time he was retained that he and his firm had a long-standing professional relationship with Algernon Blair, Inc. ("Algernon Blair"), the construction company that was designated to build the Three Lakeway project. To the best of my knowledge, Shushan also did not advise Mr. Tockarshewsky, or anyone else affiliated with Carteret, of his relationship with Algernon Blair.

8. Further, I state without equivocation that at no time from Carteret's retention of Shushan and the Shushan Firm through the closing of the Three Lakeway Construction loan on June 12, 1985 — including the May 29, 1985 New Jersey meeting — did Shushan disclose the details of his long-standing professional relationship with Algernon Blair. Further, at no time did Shushan request that Carteret waive the conflict presented by the opposing interests of Carteret and Algernon Blair with regard to the negotiation of the terms of the Contractor's Consent Agreement executed by them.

9. Both prior to and following my May 29, 1985 meeting in Roseland, New Jersey with Louis Shushan, there were numerous and continuous communications — both by telephone and by mail — by Shushan and the Shushan Firm to Carteret and its attorneys in New Jersey. (*See* Exhibit E to the accompanying Certification of Anthony J. Sylvester, Esq.)

10. Further, Mr. Shushan frequently called me in New Jersey to render legal advice regarding the Three Lakeway construction loan transaction.

11. Despite their numerous communications, at no time did

Shushan or anyone else at the Shushan Firm disclose to me or, to the best of my knowledge, anyone else at Carteret that he had modified the Contractor's Consent Agreement; advise Carteret of the legal effect and potential consequences to Carteret of the unauthorized modification to the Contractor's Consent Agreement; or, inform Carteret of its long-term relationship with Algernon Blair.

12. I can state without hesitation that Carteret would not have agreed to the Contractor's Consent Agreement in the form executed if Shushan had informed Cartere of the longstanding professional relationship between him and Algernon Blair; or had I been made aware that Shushan had modified the Contractor's Consent Agreements by adding the guarantee language; or, had Shushan advised me at the May 29, 1985 meeting in New Jersey or in the course of any subsequent communications to Carteret in New Jersey of the said modification and the possible legal effect and consequences to Carteret of that modification.

s/ Steven A. Cole
STEVEN A. COLE

Sworn and subscribed to
before me this 25th
day of April, 1989.
s/ Diane L. Knipper
DIANE L. KNIPPER
NOTARY PUBLIC OF NEW JERSEY
Commission Expires April 29, 1992